

October 15, 2015

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Ex Parte Presentation

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 12-375, Inmate Calling Services Proceeding

Dear Ms. Dortch:

This filing is respectfully submitted on behalf of Pay Tel Communications, Inc. (“Pay Tel”) in connection with the above-referenced proceeding. This filing is in follow-up to Pay Tel’s recent ex parte presentations¹ addressing its concerns with the Commission’s proposal, as set forth in its Fact Sheet, to adopt ICS reforms without restricting ICS providers’ sharing of “profits” “if such payments fit within the rate caps.”²

Pay Tel has consistently advocated in this proceeding for adoption of an explicit cost recovery mechanism as an additive component of ICS rates as part of a regulatory structure that prohibits providers from paying other forms of compensation.³ Such an approach would help to align the interests of facilities with consumers by incenting facilities to enter into contracts with

¹ See, e.g., Pay Tel, Notice of Ex Parte Presentation, WC Docket No. 12-375 (Oct. 8, 2015).

² See Fact Sheet: Ensuring Just, Reasonable, and Fair Rates for Inmate Calling Services (rel. Sept. 30, 2015), available at <https://www.fcc.gov/document/fact-sheet-ensuring-just-reasonable-fair-rates-inmate-calling>.

³ See, e.g., Pay Tel, Notice of Ex Parte Presentation, Attachment “ICS Reform: Pay Tel Ex Parte Presentation,” at 9-10, WC Docket No. 12-375 (July 14, 2015); Pay Tel, Ex Parte Notice, at Attachment “Proposed ICS Rules,” at 5-6, § 64.6060, WC Docket No. 12-375 (July 13, 2015) (“Pay Tel Proposed ICS Rules”) (proposing Facility Administrative Support payment); Pay Tel, Ex Parte Notice, at 2, WC Docket No. 12-375 (July 13, 2015) (“July 13 Ex Parte Notice”) (“[C]ost recovery for facilities should be made explicit by adding an appropriate, per-minute cost recovery component of ICS rates”). See also, generally, Pay Tel, Ex Parte Presentation, “Setting the Record Straight on Confinement Facility Costs,” WC Docket No. 12-375 (May 8, 2015).

lower calling rates in order to stimulate increased phone usage, thereby spurring healthy competition among providers that will benefit consumers.

In conjunction with that position, Pay Tel has also consistently advocated for the prohibition of the payment from ICS providers to correctional facilities of any other forms of compensation or in-kind products or services, beyond the per-minute, cost recovery fee additive.⁴ Pay Tel has argued that other options, including leaving site commission payments untouched and “letting providers and facilities work it out,” as proposed in the Fact Sheet, will perpetuate the flawed system that has led to the current proceeding.

Inherent in this advocacy is the notion that the Commission has clear authority under the Communications Act to regulate compensation arrangements between ICS providers and correctional facilities under the circumstances presented here. Several parties, most notably attorney Andrew Lipman, have presented sustained legal analysis demonstrating the existence of this authority.⁵ Similarly, the Commission itself acknowledged in its 2013 ICS Order that its authority is not diminished by tangential impacts on unregulated third parties:

Even if our actions today were somehow construed as modifying particular contractual provisions or abrogating particular contracts, we still would be acting within our lawful authority. As an initial matter, section 276(b)(3) states, “[n]othing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.” 47 U.S.C. § 276(b)(3). This provision, by its terms, does not apply to agreements entered after the 1996 Act’s adoption, thereby signaling Congress’s intent that in the event of a conflict between Commission rules under section 276 and a post-1996 contract, the rules will take precedence. Furthermore, it is well established that “[u]nder the *Sierra-Mobile* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest.” *Western Union Tel. Co. v. FCC*, 815 F.2d 1495 at 1501 (D.C. Cir. 1987) (citations omitted); cf. *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 at 5392-93,

⁴ See, e.g., Pay Tel Proposed Rules, at 5, § 64.6060; July 13 Ex Parte Notice, at 2; Pay Tel, Ex Parte Presentation, at Attachment “Elements of Last Reform of Inmate Calling Service”, WC Docket No. 12-375 (July 13, 2015) (arguing that “[p]rohibition against all other forms of payments by ICS Providers ensures no new hidden fees”).

⁵ See, e.g., Andrew D. Lipman, Ex Parte Presentation, at 1-6, WC Docket No. 12-375 (Oct. 7, 2015); Andrew D. Lipman, Ex Parte Presentation, at 2-4, WC Docket No. 12-375 (Sept. 21, 2015); Andrew D. Lipman, Ex Parte Presentation, at 9-12, WC Docket No. 12-375 (June 1, 2015); Securus Technologies, Inc., Ex Parte Presentation, at 4-6, WC Docket No. 12-375 (Feb. 18, 2015) (arguing that the Commission has legal authority to determine what costs are to be included in rates); Lattice, Inc., Comments, at 5-6, WC Docket No. 12-375 (Jan. 12, 2015); Michael S. Hamden, Comments, at 3-6, 8-9, WC Docket No. 12-375 (Jan. 12, 2015).

para.18 (2008) (“we find that we have ample authority to regulate telecommunications carriers’ contractual conduct [under section 201(b) of the Act] even though it may have a tangential effect on MTE owners.”). Here, we have adopted reforms to ensure that rates and charges for interstate ICS are just, reasonable, and fair under the Act and consistent with the public interest. To the extent that a contract between a facility and an ICS provider contains a rate that does not meet those legal standards, it would be in the public interest to mandate that the contracts be modified so that they reflect rates that comply with the relevant legal requirements. Accordingly, we would be acting within our authority to adopt these reforms even if we were understood to be directly modifying existing contracts.⁶

Although the Commission’s prior discussion was directed to the Commission’s adoption of new rate requirements and its conclusion that site commissions did not represent compensable costs which can be recovered in ICS rates, its discussion applies with equal force to other “unjust and unreasonable” practices in connection with a communications service that adversely impacts consumers.⁷

Pay Tel is in accord with the foregoing arguments of the Commission, Andrew Lipman, Securus, Lattice and Michael Hamden,⁸ believes such legal analysis is sound, and takes the position that the Commission has authority pursuant to Sections 201, 276 and 4(i) of the Act to regulate the compensation arrangements between ICS providers and facilities, which includes the authority to prohibit site commission payments.

Further, Pay Tel agrees with the arguments cited, and the Commission’s own conclusion, that the Commission’s previous decision in *Promotion of Competitive Networks in Local Telecommunications Markets* demonstrates the applicability of Section 201(b) in an analogous circumstance—where the Commission struck down exclusivity provisions in contracts between telecommunications providers and multi-tenant premises owners as an unreasonable practice under Section 201(b).⁹

Finally, Pay Tel would note that the Commission’s legal authority here is further buttressed by the robust record in this proceeding demonstrating a direct link between the existing site commissions payment structure and the consumer-impacting harms that the Commission is seeking to redress—most notably the high rates and fees associated with ICS.

⁶ *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14162, ¶ 101 n.365 (2013).

⁷ *Cf.* 47 U.S.C. § 201(b).

⁸ For the sake of brevity, Pay Tel incorporates herein by reference the arguments and authorities cited above.

⁹ *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385, 5392-93, ¶¶ 14-19 (2008).

In accordance with Section 1.1206 of the Commission's rules, this letter is submitted for inclusion in the record of the above-captioned proceeding.

Please do not hesitate to contact the undersigned should any questions arise concerning this presentation.

Sincerely yours,

/s/ Marcus W. Trathen
Marcus W. Trathen

cc (via email):

Commissioner Mignon Clyburn
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